

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE**

Christopher M. Palermo

v.

Civil No. 13-cv-232-PB

Richard Gerry, Warden,
New Hampshire State Prison et al.

REPORT AND RECOMMENDATION

Plaintiff, Christopher Palermo, has taken no action in this case since June 30, 2014, when he was transported to this court for a pretrial conference. Palermo last filed a document in this case on July 3, 2013, when he filed his Certificate of Custodial Institution to complete his in forma pauperis application. On June 8, 2015, this court issued an Order (doc. no. 20) directing Palermo to file either a notice stating that he could and would diligently prosecute this case, or a motion to voluntarily dismiss the case. The court warned Palermo that failure to respond to the Order by June 19, 2015, might result in a dismissal of this case for failure to prosecute. Palermo has not responded to the Order

Discussion

"A district court, as part of its inherent power to manage its own docket, may dismiss a case for any of the reasons prescribed in Federal Rule of Civil Procedure 41(b), including failure of the plaintiff to comply with any order of the court."

Torres-Álamo v. Puerto Rico, 502 F.3d 20, 25 (1st Cir. 2007).

The failure to diligently prosecute a case also supplies a basis for *sua sponte* dismissal of a complaint. Cintrón-Lorenzo v. Departamento de Asuntos del Consumidor, 312 F.3d 522, 526 (1st Cir. 2002) (citing Link v. Wabash R.R. Co., 370 U.S. 626, 630-31 (1962)).

The court, mindful of "the strong presumption in favor of deciding cases on the merits," García-Pérez v. Hosp. Metropolitano, 597 F.3d 6, 7 (1st Cir. 2010), considers the totality of the circumstances in determining whether dismissal is appropriate. See Díaz-Santos v. Dep't of Educ., 108 F. App'x 638, 640 (1st Cir. 2004). In particular, the court considers whether: (1) plaintiff prosecuted his claims diligently prior to his apparent abandonment of the lawsuit; (2) the court fairly warned plaintiff of its inclination to dismiss absent diligent prosecution; and (3) the ramifications of the plaintiff's failure to prosecute "constituted misconduct sufficiently

extreme to justify dismissal with prejudice." Id. internal quotation marks and citations omitted).

Here, aside from filing a complaint and in forma pauperis application in 2013, and appearing at a scheduled hearing in June 2014, plaintiff has not diligently prosecuted, or even participated, in this case. Palermo has responded neither to a motion to dismiss nor to a motion for summary judgment. The court has issued Orders setting forth clear expectations for plaintiff's compliance with procedural rules applicable to this matter, setting forth clear deadlines by which to do so, and, ultimately, advising plaintiff that his failure to comply with those orders or otherwise prosecute this action might result in dismissal of the case. See Doc. Nos. 18 and 20. Palermo has failed to respond to these Orders or to otherwise prosecute this case. Accordingly, the district judge should dismiss this matter for failure to prosecute.

The court next considers whether dismissal should be with prejudice.

Dismissal with prejudice for failure to prosecute is appropriate in the face of extremely protracted inaction (measured in years), disobedience of court orders, ignorance of warnings, contumacious conduct, or some other aggravating circumstance.... [W]here the case is close, courts should prefer less severe sanctions that preserve the possibility of disposition on the merits.

Pomales v. Celulares Telefónica, Inc., 342 F.3d 44, 48 (1st Cir. 2003) (internal citations and quotation marks omitted). In considering these factors, the court finds that a dismissal with prejudice is not warranted. Accordingly, the district judge should dismiss this case without prejudice.

Conclusion

For the foregoing reasons, the court recommends that this matter be dismissed without prejudice for failure to prosecute, and the pending motions to dismiss (doc. no. 14) and for summary judgment (doc. nos. 15 and 16) be denied as moot. Any objections to this report and recommendation must be filed within fourteen days of receipt of this notice. See Fed. R. Civ. P. 72(b)(2). Failure to file objections within the specified time waives the right to appeal the district court's order. See United States v. De Jesús-Viera, 655 F.3d 52, 57 (1st Cir. 2011); Sch. Union No. 37 v. United Nat'l Ins. Co., 617 F.3d 554, 564 (1st Cir. 2010).



Andrea K. Johnstone
United States Magistrate Judge

June 24 , 2015

cc: Christopher M. Palermo, pro se
Francis Charles Fredericks, Esq.